FILED
NOV 21 1994
OFFICE OF THE CLERK

No. 94-32

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ALLSTATE INSURANCE COMPANY,
Petitioner,
v.
FRANK S. DEUS and
VOORHIES & LABBÉ,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

DONA J. DEW *
DOUGLAS L. GRUNDMEYER
CHAFFE, MCCALL, PHILLIPS,
TOLER & SARPY, L.L.P.
1100 Poydras Street, Suite 2300
New Orleans, LA 70163-2300
(504) 585-7008

JAMES G. SOTOS
HERVAS, SOTOS & CONDON, P.C.
333 Pierce Road, Suite 195
Itasca, IL 60143-4109
(708) 773-4774

GREGORY ROHLFING
ALLSTATE INSURANCE COMPANY
Allstate Corporate Litigation
2775 Sanders Road, Suite A2
Northbrook, IL 60062-6127
(708) 402-8791

* Counsel of Record
Attorneys for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

10 pp

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-32

ALLSTATE INSURANCE COMPANY,
Petitioner,

v.

FRANK S. DEUS and
VOORHIES & LABBÉ,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

REPLY BRIEF FOR PETITIONER

I. DEUS' CONTENTION THAT THE DISTRICT COURT IMPROPERLY REFUSED TO ENTERTAIN HIS FRAUD CLAIM IS IRRELEVANT TO THE QUESTION PRESENTED WHICH CONCERNS ONLY THE COURT'S POWER TO ENJOIN RELITIGATION OF THAT CLAIM IN STATE COURT

Deus' focus on the district court's refusal to entertain his fraud claim is a red herring. Whether the court properly denied his motion to add the fraud claim is entirely irrelevant to the question presented which involves the extent to which *res judicata*, as a component of the relitigation exception, survived this court's decision in *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1988). Deus

concedes that "a conflict may exist among the circuits" on that question (Deus' Response, p. 10).

In Deus' attempt to remove this case from that conflict, he never addresses whether the "could have been asserted" language encompasses inadequately presented claims. Rather, Deus simply offers his conclusion that because the District court improperly denied his motion to add his fraud claim, the claim is not one which "could have been asserted" for purposes of the relitigation exception. (*See* Deus' Response, p. 10). Deus makes this contention in an attempt to square the lower court with the Ninth Circuit's decision in *Western Systems, Inc. v. Ulloa,* 958 F.2d 864 (9th Cir. 1992), which interpreted the relitigation exception to encompass all claims that "might have been offered" in the prior proceeding. *Id.* at 871. The *Ulloa* court, however, concluded that the test for determining whether a claim could have been asserted in a prior proceeding turns on whether that claim arose "from the same 'transaction, or series of transactions' as the original action." *Id.* at 871, citing Restatement (Second) Judgments § 24(1). In this case, Deus does not dispute that all of his claims, including his fraud claim, arose from the same core of operative facts such that traditional application of *res judicata* would bar him from refiling the fraud claim in a subsequent federal action. *See Poe v. John Deere Co.,* 295 F.2d 1103 (8th Cir. 1982) (applying federal principles of *res judicata* to an analogous factual scenario independent of the Anti-Injunction Act). Under *Ulloa's* interpretation of the relitigation exception, therefore, Deus' fraud claim fits comfortably within the district court's injunctive power.

The district court's justification for refusing to entertain Deus' fraud claim sheds no light on the proper range of federal power to enjoin further litigation of that claim. The propriety of the district court's decision to

deny the motion to add the fraud claim is an issue for an appeal on the merits of that decision.[1]

Whether intended or not, the import of the Fifth Circuit's decision, and the theory urged by Deus, is that every claim rejected by a federal court for any reason "could not have been asserted" in that case, thus opening the door to reassertion of that claim in state court (*see* Deus' Response, p. 11). That theory collapses *res judicata* into collateral estoppel and, as argued in Allstate's petition, "deprives the federal district courts of the power and flexibility needed to prevent manipulation of our dual system of federal and state courts. . . ." (Petition For A Writ of *Certiorari,* p. 13). Despite Deus' protestations to the contrary, the court of appeals' narrow interpretation of federal injunctive power under the relitigation exception presents a question of national importance which has divided the courts of appeals, thus warranting issuance of a writ of certiorari to review the decision of the Fifth Circuit.

II. THE INJUNCTION WAS APPROPRIATE UNDER THE RELITIGATION EXCEPTION BECAUSE THE OUTCOME OF DEUS' FRAUD CLAIMS WAS NECESSARILY DICTATED BY THE LOWER COURTS FINDINGS OF FACT

Deus' response also highlights the need to clarify the application of the collateral estoppel component of the relitigation exception. In *Chick Kam Choo,* the Court approved the use of an injunction against relitigation of

---

[1] Indeed, Deus' suggestion that he appealed the entire case but that "space limitations" prevented him from dealing with the district court's denial of his motion to add his fraud claim at "great length" in his brief to the Fifth Circuit is disingenuous at best and misrepresents a clear record. (*See* Deus' Response pp. 11-12). Deus never mentioned the denial of his motion to amend in his statement of issues to the Fifth Circuit in either of his two appeals (*see* appendix A & B), and, similarly, the issue was never discussed in his briefs.

matters, the outcome of which are necessarily dictated by the district court's resolution of certain issues. 486 U.S. at 150. To avoid the reach of *Chick Kam Choo,* Deus now contends that the "decision on the merits of the claim of intentional infliction of emotional distress does not in anyway preclude a separate, and perhaps different, decision on the merits of any fraud claims." (Deus' Response, p. 12)

Deus' contention distorts a clear record. The analysis required by *Chick Kam Choo,* which was never undertaken by the court of appeals, establishes that the lower courts' resolution of Deus' claims on the merits necessarily dictates the outcome of his fraud claim. In support of his fraud claim, Deus alleged that Allstate "intentionally manipulated, fabricated, and falsified plaintiff's 'peer groups' to make it appear as though plaintiff's work was unsatisfactory when, in fact, it was not." (Petition For A *Writ of Certiorari,* 72a-74; 76a-80a). In granting Allstate's motion for judgment as a matter of law on Deus' intentional infliction of emotional distress claim, the district court expressly rejected those contentions, finding that "[w]e cannot imagine a more appropriate group for the purpose of corrective review." (Petition For A *Writ of Certiorari,* 63a-64a). Similarly, the court of appeals concluded "[t]o the extent that Allstate manipulated peer groups, it was in order to demonstrate the superior production of [neighborhood office agents] over [company office agents], not to harass Deus for any personal reasons." (Petition For A *Writ of Certiorari,* 13a).

The lower courts' conclusions that Deus' peer groups were not intentionally manipulated to create a false impression of poor work performance necessarily preclude a finding that those groups were fraudulently manipulated for the same purpose. Accordingly, the lower courts' rejection of the factual predicate for Deus' fraud claim supports the district court's injunction against relitigation of that claim in state court. The Fifth Circuit's over-

turning of the injunction allows collateral attack on the lower courts' conclusions. Indeed, permitting Deus to go forward on the fraud claim ultimately pits the state court against both the District Court and the Fifth Circuit, a result the relitigation exception was designed to prevent.

CONCLUSNON

The *Petition For A Writ Of Certiorari* should be granted.

Respectfully submitted,

DONA J. DEW *
DOUGLAS L. GRUNDMEYER
CHAFFE, MCCALL, PHILLIPS,
TOLER & SARPY, L.L.P.
1100 Poydras Street, Suite 2300
New Orleans, LA 70163-2300
(504) 585-7008

JAMES G. SOTOS
HERVAS, SOTOS & CONDON, P.C.
333 Pierce Road, Suite 195
Itasca, IL 60143-4109
(708) 773-4774

GREGORY ROHLFING
ALLSTATE INSURANCE COMPANY
Allstate Corporate Litigation
2775 Sanders Road, Suite A2
Northbrook, IL 60062-6127
(708) 402-8791

* Counsel of Record

Attorneys for Petitioner

APPENDICES

APPENDIX A

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. After the jury returned its verdict in Plaintiff's favor, and after the trial judge denied Defendant's Rule 50(a) motion for a directed verdict, the trial court changed its mind and granted the 50(a) motion on the issue of intentional infliction of emotional distress, dismissing Plaintiff's suit at Plaintiff's cost. However, the jury verdict was supported by substantial evidence, and the question on appeal thus becomes: whether the trial judge can substitute his opinions on credibility for those of the jury, and direct a verdict in favor of Defendant where the jury verdict is supported by substantial evidence and is dependent upon credibility determinations.

2. Plaintiff had a written employment contract with Allstate and asserted several breach of contract claims, based first upon Allstate's failure to honor its contractual provisions with regard to disciplinary proceedings; second, upon Allstate's failure to provide contractually agree upon support and assistance to sell insurance; and, third, upon constructive termination. However, the lower court dismissed all breach of contract claims, holding that the contract was void as contrary to public policy, and further, that Louisiana does not recognize the doctrine of constructive termination. The issue on appeal is whether a written contract, drafted by the employer, whereby the employer voluntarily agrees to limit the method by which an employee can be terminated, is unenforceable as contrary to public policy, and whether the trial court erred in dismissing all of Plaintiff's breach of contract claims pursuant to a 50(a) motion.

3. Plaintiff also asserted an abuse of rights claim, which was dismissed by the trial court on a motion for summary judgment. The issue on appeal is whether Plaintiff presented genuine issues of material fact to show that Allstate abused any right which it may have had to discipline him pursuant to its contractually mandated corrective review

procedure when it falsified that procedure, and whether the motion for summary judgment was improvidently granted.

4. Plaintiff also asserted a worker's compensation claim for his work-related injury caused by Allstate's intentional harassment and infliction of emotional distress. This claim was dismissed by the trial court on a motion for summary judgment. The issue on appeal is whether Louisiana law provides that a mental injury, caused by substantial stress on the job, fits the definition of "accident" within the meaning of the worker's compensation law in effect during 1987, and whether the motion for summary judgment was improvidently granted. Additionally, the issue on appeal is whether, under Louisiana law, an employer is liable for *both* worker's compensation and intentional tort, i.e. liable for both worker's compensation and intentional tort damages without any credit for amounts paid in worker's compensation against amounts due for the intentional tort.

5. As will be shown throughout this brief, Plaintiff presented substantial evidence to support his claims at trial. However, in the alternative, if this Court finds that sufficient evidence was not presented to support any claim, Plaintiff would note that, at trial, the court severely limited presentation of evidence which supported Plaintiff's case by allowing only three days for Plaintiff to present voluminous amounts of evidence in his case in chief, and refusing to allow Plaintiff's counsel to fully cross examine Allstate's witnesses (whom Plaintiff did not have time to call in his case in chief) when these witnesses were presented in Allstate's case in chief. Because of these arbitrary time restrictions, Plaintiff did not have time to present all of the witnesses, testimony, or evidence which supported his case. Therefore, the alternative issue on appeal is, if Plaintiff did not present sufficient evidence to support any of his claims, whether the trial judge erred in granting the Rule 50(a) motions for alleged lack of evidence to support the claims, when the lower court itself refused to allow Plaintiff to present all the evidence which supported his case.

APPENDIX B

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred in granting the motion for summary judgment filed by the Intervenor, Voohries & Labbe, Plaintiff's previous attorneys, on the question of the Plaintiff's payment of additional litigation costs, when the only evidence in the record shows that Plaintiff was not liable for these costs, and the contract does not require him to pay such costs.

2. Whether a federal trial court has jurisdiction to enjoin state court proceedings once an appeal has been taken.

3. Whether a federal court has authority to enjoin a party from proceeding in state court, when the state court suit presents causes of action different from those asserted in federal litigation, and the state court proceedings name additional defendants not named in the federal proceedings.

4. Whether the trial court erred in completely sealing the court record and denying all public access to the trial throughout the entirety of the trial; and whether the trial court erred in denying the motion of NNOAC and Randy Lane to Intervene in the lawsuit to unseal the court record.